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IN THE

Supreme Court of the United States

OCTOBER TERM 1981

MICHAEL BEN-LEVI,

Appellant,

v.

SHARON E. BEN-LEVI,

Appellee.

On Appeal from the Superior Court of
the State of New Jersey, Appellate Division

BRIEF FOR APPELLANT IN OPPOSITION TO THE MOTION TO DISMISS

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In response to the Jurisdictional Statement filed on May 8, 1981, the Appellee submitted a Motion to Dismiss dated September 30, 1981. The Appellee states on page 2 of her motion that the appeal "does not contain any clear federal issue." At the conclusion of her motion on page 5, Appellee also maintains that the appeal "does not involve a substantial federal question."

THE FEDERAL QUESTION IS CLEAR AND WAS RAISED AT EVERY STAGE

In his Notice of Motion to Dismiss - Lack of Jurisdiction Over the Person filed with the Superior Court of New Jersey on June 12, 1979,[1] the Appellant cited *May* v. *Anderson*, 345 U.S. 528, 533 (1953) in maintaining that a forum state cannot deprive a nonresident defendant parent of his right to custody without exercising *in personam* jurisdiction. See annexed Memorandum of Points and Authorities, page 4, lines 7-14. The Appellant then sought the protection of the Federal Constitution by relying on *Kulko* v. *Superior Court of California*, 436 U.S. 84, 91 (1978) in stating that [t]he Due Process Clause of the Fourteenth Amendment [United States Constitution] operates as a limitation on the jurisdiction of state courts to enter judgments affecting rights or interests of nonresident defendants."[2] Page 5, lines 13-17. Lacking minimum contact with the state of the forum, the Appellant maintained that he

[1]At the request of the Appellant, a certified copy of all documents from the record mentioned in this brief was sent under seal to the Clerk of this Court by the Clerk of the Supreme Court of New Jersey.

[2]The Appellant purposely included in the original document filed with the Superior Court of New Jersey the words 'United States Constitution' in brackets to emphasize that he was seeking the protection of the Federal Constitution and laying the basis for the raising of a federal question.

"ought not be required to defend himself in the State of New Jersey." Page 6, lines 27-28.

These identical points were again raised by the Appellant in his Notice for Stay of Judgment filed on June 18, 1979. See the second page of the Certification annexed to the Notice for Stay, lines 3-8, and 13-17.

In his Notice of Appeal to the Superior Court of New Jersey, Appellate Division filed on February 15, 1980, the Appellant drew into question the validity of N.J.S.A. 9:2-1, N.J.S.A. 2A:34-32, and N.J.S.A. 2A:34-33. Page 4, lines 2-19. The latter two statutes contain the procedural due process of law requirements of the Uniform Child Custody Jurisdiction Act (UCCJA). The constitutionality of those statutes was challenged on the basis of specific reference to the Due Process Clause of the Fourteenth Amendment to the Constitution, and by citing both *Shaffer* v. *Heitner*, 433 U.S. 186 (1977) and *Kulko, supra.* Page 3, lines 20-28.

On November 17, 1980 the Appellate Division issued a Per Curiam which states that the "[j]urisdictional doctrines concerning status," contained in those statutes "are consistent with procedural due process. See *Shaffer* v. *Heitner*, 433 *U.S.* 186, 208 n. 30, 97 *S.Ct.* 2569, 2582 n. 30, 53 *L. Ed.* 2d 683 (1977)." Page 9, lines 9-12. The Appellate Division not only responded to the federal question, but relied upon the Federal Constitution by citing *Shaffer* v. *Heitner, supra,* as authority.

In his Petition for Certification to the Supreme Court of New Jersey, the Appellant formally presented a two-part federal question which is almost identical to the one contained in the Jurisdictional Statement. See page 1 of the Reply Brief filed on January 14, 1981.

Due to the fact the judgment rendered by the Superior Court of New Jersey, Appellate Division upheld the constitutionality of state statutes whose validity under the Federal Constitution was clearly drawn in question, the Appellant is fully justified in seeking review on appeal by invoking subparagraph (2) of Title 28 of the United States Code, Section 1257.

THE FEDERAL QUESTION IS VERY SUBSTANTIAL

Altogether, this Court agreed to review the federal question in five family law cases which involved child custody.[3] In each case the federal question asked whether the state of the forum is required by Article IV, §1 of the United States Constitution to grant full faith and credit to the custody decree of a sister state.

Those who had hoped that the Full Faith and Credit Clause would be used as the means to prohibit or limit a court of competent jurisdiction from modifying an out-of-state custody decree were disappointed by *Halvey, supra.*[4] There is consensus that a "custody decree [is] not irrevocable and unchangeable," *Halvey, supra,* at 612. Consequently, there was no basis upon which the

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[3] *Halvey* v. *Halvey*, 330 U.S. 610 (1947); *May* v. *Anderson*, 345 U.S. 528 (1953); *Kovacs* v *Brewer*, 356 U.S. 604 (1958); *Ford* v. *Ford*, 371 U.S. 187 (1962); and *Webb* v. *Webb*, No. 79-6853 (1981). The defect in *Webb, supra,* is not that this Court found the federal question less substantial than originally thought, but that it was not properly raised in the state courts.

[4] See Bodenheimer, *Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody, and Excessive Modification*, 65 Cal. L. Rev. 978, 981 n. 21 (1977).

Halvey Court could deny a court of competent jurisdiction the right to modify an out-of-state decree on grounds permitted by the rendering state.

The second custody case to be reviewed by this Court considered the question whether in the absence of personal jurisdiction, an *ex parte* custody decree rendered by one state had any binding effect upon the absent parent or required the granting of full faith and credit by another state. The plurality opinion in *May* v. *Anderson, supra,* relied on *Estin* v. *Estin,* 334 U.S. 541 (1948). However, the rule that emerged from *May* was foreshadowed by *Halvey, supra,* at 614.

> "If the court of the State which rendered the judgment had no jurisdiction over the person or the subject matter, the jurisdictional infirmity is not saved by the Full Faith and Credit Clause."

The opinions rendered in *Kovacs* v. *Brewer, supra,* and *Ford* v. *Ford, supra,* followed the *Halevy-May* approach. These decisions were a further disappointment to those who felt that these two cases "presented an opportunity for the Supreme Court to bar foreign custody relitigation through the doctrine of full faith and credit."[5] Belatedly, an awareness emerged that the Full Faith and Credit Clause is not a remedy for interstate custody disputes.

The fruit of this awareness was the drafting of the Uniform Child Custody Jurisdiction Act and its adoption into state law by the legislatures of almost all states. The provisions of the Act are designed to prevent concurrent jurisdiction. However, "current judicial interpretations of the UCCJA has not ensured

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[5]Sanders, *Prevention of Child Stealing: The Need for a National Policy,* 11 Loy. L.A. L. Rev. 829, 837 (1978).

single-state jurisdiction in custody cases."[6]

This point was dramatically evident in *Webb,* v. *Webb, supra,* where the interpretation of the jurisdictional provisions of the UCCJA led the courts of Florida and Georgia to each claim jurisdiction and render contradictory decrees. For the most part, arguments regarding whether Georgia, the state of the forum and court of original jurisdiction, was required to grant full faith and credit to the Florida modification centered on which state had correctly interpreted the Uniform Act. As Justice White suggested, "[t]his is purely a question of state law not properly subject to review in this Court." *Webb, supra,* at 2 n. 1 (slip opinion).

The only argument in *Webb* based on a federal issue was raised by the respondent. He asserted that Florida did not exercise jurisdiction over his person. Citing *May* v. *Anderson, supra,* he implied that Georgia was therefore not required to accord the Florida decree full faith and credit. See Brief of Respondent, at 22-23.

The constitutional issue raised in this appeal represents the single most substantial, reoccurring, and unresolved federal question in the area of American family law. **It is one which only this Court can resolve.**

> "The controversy over the *Shaffer* status exception statement will be settled only by further clarification from the United States Supreme Court." Notes, *Pasqualone v. Pasqualone: Interstate Child Custody Tug-of-War Continues,* 10 Cap. U. L. Rev. 343, 357 (1980).

Not only was the question of personal jurisdiction the

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[6] *Id.,* at 835.

sole federal issue raised in *Webb*, but it constitued the federal question in three recent state court decisions. *Goldfarb* v. *Goldfarb*, 264 Ga. 24, 268 S.E. 2d 648 (Sup. Ct. 1980); *Pasqualone* v. *Pasqualone*, 63 Ohio St. 2d 96, 406 N.E. 2d 1121 (Sup. Ct. 1980); and *In re the Marriage of Leonard*, 112 Cal. App. 3d 430, 175 Cal. Rptr. 903 (1st Dist. 1981).

The Appellant already pointed out in his Second Supplemental Brief that the Supreme Court of Georgia and of Ohio reached opposing and conflicting decisions on the issue. Again, only this Court can resolve a conflict between the decision of the court of last resort in one state and the decision of another state court of last resort. As one commentator noted:

> "Just as it may have appeared to the proponents of the UCCJA that passage in all fifty states might be possible and that *May v. Anderson* had settled forever in a quiet grave, *Pasqualone* appeared in Ohio and *May* was resurrected." Notes, 350-351.

In *Webb, supra*, the National Conference of Commissioners on Uniform State Laws (NCCUSL) filed an Amicus Brief on behalf of the respondent. The brief stated that even though the Florida decree is not entitled to full faith and credit in Georgia, it should not be denied full faith and credit because Florida lacked personal jurisdiction over the respondent. *Id.*, at 18. In its amicus brief, the NCCUSL called upon this Court to "reject, as finally overruled, the case of *May* v. *Anderson*," *Id.*, at 4.

It is unfortunate that the NCCUSL perceives of *May* as a threat which would undermine the objectives of the UCCJA. According to the NCCUSL, Section 14 of the UCCJA may be the most critical section in the

entire Act. Its purpose is to limit the modification of a decree and to protect jurisdiction in the initial forum. *Id.*, at 7. Though the NCCUSL favors the continuing jurisdiction of the initial state over a second state that could claim jurisdiction as the home state, the Act grants to the new home state the sole prerogative to make that determination.

The constitutional requirement that a forum state exercise personal jurisdiction over a nonresident defendant before it can render a judgment affecting his rights and interests acts as a countervailing factor in balancing the interests of the child, parents, and forum states. The Appellant proposed in the Jurisdictional Statement that if the new home state does not exercise personal jurisdiction over a nonresident parent who continues to reside in the decree rendering state, jurisdiction to modify a custody decree would pass to the new home state only if the forum of the defendant determines that it would be in the best interests of the child.[7]

This formula provides that the choice of forums will be based on the best interests of the child. It protects the prerogatives of the state exercising continuing jurisdiction. Moreover, it conforms to the minimum contact standard because it ensures a defendant-forum nexus at proceedings where the choice of forums will be litigated.

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[7]This approach, which favors the forum state of original jurisdiction, is not only in keeping with the position of the NCCUSL which seeks to protect the continuing jurisdiction of the initial forum, but is also consistent with this Court's view in *Kulko, supra.* "Finally, basic considerations of fairness point decisively in favor of the appellant's State of domicile as the proper forum for adjudication of this case, whatever the merits of appellee's underlying claim. It is appellant who has remained in the State of the marital domicile, whereas it is appellee who has moved across the continent." *Kulko, supra,* at 97.

There are a number of similarities between the instant case and *Webb*. A forum state which met the six month residency requirement of the UCCJA assumed jurisdiction to modify and out-of-state decree without regard to the continuing jurisdiction of the initial forum state, and without exercising personal jurisdiction over the non-resident defendant.

There is, however, one crucial difference. In *Webb* as in all previous cases involving competing custody decrees, at the end of the litigation process one judgment superseded the other.[8] To illustrate, when this Court denied jurisdiction in *Webb*, the Georgia decree superseded the Florida judgment because Georgia exercised personal jurisdiction over both parents.

On the other hand, should this Court fail to note probable jurisdiction, the New Jersey decree will not supersede the reaffirmed California judgment. New Jersey issued an *ex parte* modification of custody decree, and California did not and was not required to accord it full faith and credit. *May* v. *Anderson, supra,* at 533. Yet, that decree is valid in New Jersey.

Halvey speaks of the Full Faith and Credit Clause as a "command" that "requires the judgment of a sister

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[8]The term conflict or conflicting should be reserved only for situations where two decisions, judgments, or laws are inconsistent or contradictory, and when one does not supersede the other because they are both of equal validity. The most frequently cited case involving "conflicting decrees" in the area of child custody is *Pate* v. *Stout*, 209 Ga. 786, 75 S.E. 2d 748 (1953), *cert. denied*, 347 U.S. 968 (1954), and *Stout* v. *Pate*, 120 Cal. App. 2d 699, 261 P. 2d 788 (2nd Dist. 1953), *cert. denied*, 347 U.S. 968 (1954). When this Court denied certiorari, the California judgment automatically prevailed because it was the latter one, and that court also exercised *in personam* jurisdiction. Case cited in *Commissioners' Prefatory Note*, UCCJA, 9 U. L. A. 111, 112 (1979); Note, *Long-Arm Jurisdiction in Alimony and Custody Cases*, 73 Col. L. Rev. 289, 308 n. 153 (1973); and Notes, *Pasqualone, supra*, at 359 n. 78.

State to be given full, not partial credit in the State of the forum." *Halvey, supra,* at 614. The Full Faith and Credit Clause, as it applies to custody decrees, is not for the purpose of placing a straight jacket on the power of a court of competent jurisdiction to modify an out-of-state judgment. It does, however, ensure that any modification rendered by a court of competent jurisdiction supersedes the decree which was modified. "Full Faith and Credit Clause, after all, makes the valid *in personam* judgment of one State enforceable in all other States." *Shaffer* v. *Heitner, supra,* at 210.

For obvious reasons, an *ex parte* divorce decree is the singular exception. *Williams* v. *North Carolina,* 317 U.S. 287 (1942). However, in the area of custody an anomoly exists. *Ex parte* modification of custody decrees have a "jurisdictional infirmity" sufficient to not require recognition by other states, but not sufficient to be invalid in the rendering state. Courts have it both ways while children and parents are traumatized by the impossible co-existence of two, equally valid, conflicting custody decrees.

In the event this Court fails to note probable jurisdiction, the legal stalemate over the status of the children will continue indefinitely. This being the court of last resort in the United States, there is no further legal recourse in this country. The United States will have failed to provide the elementary legal protection to the family required by Article 16, paragraph 3 of the United Nations Universal Declaration of Human Rights.

For children caught in this legal dilemma, continued residence in this country will mean either being confined to the jurisdiction of one of two states or be subject to ongoing parental abduction outside the reach of law in the remaining forty-eight where the rights of

the parents are equal and neither decree can lay greater claim to recognition.

Minor children of divorced parents have a constitutional right to the legal protection afforded by one, universally recognized, child custody decree. Failure to provide this protection constitutes a very serious violation of human rights. For this reason, messages urging this Court to review and resolve the tragic problem of two, equally valid, conflicting custody decrees were sent by the Lieutenant Governor of the State of California, the Los Angeles County Board of Supervisors, the Los Angeles City Council, the Board of Rabbis of Southern California, Church Women United, the Los Angeles West Association of American Baptist Ministers, the National Council of Jewish Women - Los Angeles Section, the Senate of Priests of the Catholic Archdiocese of Los Angeles, the Southern California Council of Churches, and television station KNXT-CBS in an editorial which was aired on September 21 and 22.

Common to all those messages is the insistence that the underlying constitutional issue responsible for conflicting child custody decrees be resolved now.

Dated: October 18, 1981.

Respectfully submitted,

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